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November 3, 2011

BY E-FILING

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: ***Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company [Barrington Petition for Mitigation]*** **(Docket No. FD 35087 (Sub-No. 8))**

Dear Ms. Brown:

Enclosed for filing in the above referenced sub-docket please find CN's Reply in Opposition to the Village of Barrington's Petition Seeking Imposition of Additional Mitigation (designated as CN-65).

Very truly yours,

Paul A. Cunningham
Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: Richard H. Streeter, Esquire

CN-65

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35087 (Sub-No. 8)

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY

[Barrington Petition for Mitigation]

CN'S REPLY IN OPPOSITION TO THE VILLAGE OF BARRINGTON'S PETITION SEEKING IMPOSITION OF ADDITIONAL MITIGATION

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[Barrington Petition for Mitigation]

CN'S REPLY IN OPPOSITION TO THE VILLAGE OF BARRINGTON'S PETITION SEEKING IMPOSITION OF ADDITIONAL MITIGATION

CN[1] herein responds to the Petition filed October 14, 2011 by the Village of Barrington, Illinois ("Barrington") seeking imposition of additional mitigation (the "Petition"). The Petition should be denied.

SUMMARY OF ARGUMENT

Almost three years ago, on December 24, 2008, the Board issued its Final Decision approving CN's acquisition of the major portion of the EJ&E rail line subject to various environmental mitigation conditions. Barrington participated in the lengthy environmental review process in the EJ&E proceeding. Through its comments, which summarized the conclusions of a 2008 traffic study ("2008 Study"), Barrington sought to persuade the Board to block the Transaction or, in the alternative, to require CN to fund a trench to grade separate four

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[1] Unless otherwise defined, "CN" and other short forms and abbreviations used herein have the meanings set forth in the Table of Abbreviations in the Application (CN-2 at 8-11).

roads in Barrington, including U.S. Route 14.[2] In response, the Board "did all that NEPA required of it" by taking "a 'hard look' at the transaction's environmental impacts, examin[ing] strategies for mitigating those impacts, and field[ing] and respond[ing] to . . . comments." *Village of Barrington v. STB*, 636 F.3d 650, 672-73 (D.C. Cir. 2011).

Although NEPA does not require environmental mitigation, the Board ordered tailored mitigation to address traffic concerns in Barrington,[3] but it denied Barrington's request that it block the Transaction or require CN to fund grade separations in Barrington. The Board agreed with the reasoning and conclusion of SEA (which evaluated both a grade separation at Route 14 and the concept of placing the EJ&E rail line in a trench through Barrington, FEIS at 4-16) that a grade separation was not warranted in Barrington. Final Decision at 45. In determining whether and what mitigation was appropriate at a particular grade crossing, SEA considered a "host of factors," *id.* at 44, such as vehicular delay at crossings, "safety-related exposure concerns," "existing congestion, existing structures (such as, mature trees, and local roadways) near the highway/rail at-grade intersection, and the cost of a grade separation."[4] FEIS at 4-10. With

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[2] *See, e.g.*, Barrington's DEIS Cmts. at 20-21 ("If SEA recommends approval of the Proposed Action, however, that approval must be conditioned upon an obligation on the part of the Applicants to pay the full cost (design, construction and maintenance) of lowering the EJ&E Line into a trench that would allow the streets crossing the line from Cuba Marsh through the Barrington area to retain their current elevation and grade. It is particularly important that Lake Zurich Road, US Route 14, Illinois Route 59 and Lake Cook Road be grade-separated.").

[3] *See* Final Mitigation Conditions ("FMCs") 15(c) & 18, Final Decision at 76, 77.

[4] SEA stated that it "would not require a grade-separated crossing to mitigate for total vehicle delay only." FEIS at 4-12. It found that grade separations would be inappropriate for at least five crossings that had a total vehicle delay that exceeded SEA's 40-hour threshold for being a "substantially affected" crossing, noting that "the Chicago metropolitan area has not consistently used the threshold of total vehicle delay greater than 2,400 minutes (40 hours) in a 24-hour period, as the determining threshold when making decisions to invest in a grade-separated crossing." *Id.* At four of those five crossings (Chicago Road, Broad Street, Western Avenue, and Montgomery Road) the STB ordered no mitigation at all. FEIS at 2-43—2-44 (noting that "[w]hile SEA used total vehicle delay as a major consideration in considering whether its

respect to Barrington, SEA noted – and Barrington does not deny – that "existing vehicle delay conditions" unrelated to the Transaction were already problematic. *Id.* at 4-14.

If Barrington had had any basis to assert that the Board's decision regarding a grade separation constituted material error, it could have filed a timely petition for reconsideration of the approval decision under 49 C.F.R. § 1115.3(e). It did not do so. Instead, Barrington petitioned the D.C. Circuit to review the Board's order. The Court unanimously held that the Board had committed no error, and it also found that Barrington had procedurally defaulted on its arguments based on its 2008 Study.

Barrington now claims that the Board should reopen its Final Decision approving the Transaction based on "newly discovered evidence and changed circumstances, as well as material error," Pet. at 1, and it asks the Board to order CN to provide 84% or more of the funding for a grade separation at U.S. Route 14, *id.* at 22, based on the assertion that CN's acquisition will cause more traffic delays than the FEIS projected. But Barrington offers no material new evidence.

Essentially its only new evidence concerning the U.S. Route 14 crossing is a single page (Table A-1) in an "updated" traffic study ("2011 Study"), which purports to summarize observations regarding the frequency, scheduling, and speed of trains that CN was running over the Route 14 crossing over a 35-day period in May/June 2011. That brief snapshot of CN's continuing post-acquisition implementation of the Transaction provides no basis for inferring that the FEIS's projections – which focused on 2015 – materially underestimated traffic delays. According to Barrington's 2011 data, CN was running an average of 6 trains per day across the crossing – as compared to the pre-acquisition status quo of 5 trains per day and the FEIS's

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mitigation is warranted, it was not the only factor"). At the fifth, Old McHenry Road, the Board ordered the same relief that it ordered for Barrington. FMCs 15(a) & 18.

projection for 2015 of 20 trains per day – and those 2011 trains were, on average, substantially shorter than the FEIS's projected average train length for 2015, and travelled considerably faster than EJ&E's trains in 2008,[5] though not up to the full speed projected for 2015.[6]

Instead, the gist of Barrington's Petition, and its supporting 2011 Study and verified statement, is its claim that the Board was "misled" – by its own FEIS, its own SEA, and its own consultants – and that traffic delays at Barrington – and, by implication, everywhere along the EJ&E line – should have been projected using different assumptions and models that would have yielded larger delay totals. *See, e.g.*, Pet. at 5-6, 14-21, 24-26. Barrington's claim that the FEIS contained methodological errors is not new, and it has nothing to do with new evidence or changed circumstances. Barrington leveled essentially the same criticisms at the EIS (which criticisms it claims its 2011 Study "confirm[s]," *id.* at 14) before the Board in 2008, and before the D.C. Circuit. The D.C. Circuit found that the Board had already given these issues a "hard look" and that its methodology and its rejection of Barrington's arguments were reasonable. Barrington's arguments fail on their face to demonstrate material error.[7]

In sum, Barrington relies on old evidence and arguments that have already been conclusively rejected by both the Board and the D.C. Circuit, and it demonstrates no changed circumstances, no error, and no materiality. And its 2011 Study, like its 2008 Study, ignores the fundamental point made by Board, and acknowledged and left undisturbed by the Court, that

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[5] According to Barrington, train speeds were measured in 2008 at 16 to 24 mph, and in 2011 at an average of 32 mph. 2011 Study at 9, 12.

[6] The FEIS projected speeds of 39 mph at Northwest Highway (Route 14) in 2015. FEIS App. A at 489 (Table 4.3-5).

[7] Barrington does not assert that Route 14 satisfies the multiple criteria other than delay that the Board considered, in its discretion, in deciding whether to order grade separation funding. Instead, Barrington concedes that, unlike the Aurora crossing for which the Board did order grade separation funding, Route 14 does not reach the Board's vehicle/train exposure threshold level of concern. Pet. at 13; 2011 Study at 17.

much of Barrington's present and expected traffic congestion stems from pre-existing conditions unrelated to the Transaction that, under its longstanding practice, do not call for Board-imposed mitigation. *See Village of Barrington*, 636 F.3d at 672; Final Decision at 38 n.82; FEIS at 4-14. Yet Barrington asks the Board to change its mind and make a fundamental retroactive change to its approval decision that would impose tens of millions of dollars of additional costs on CN long after the Board's Final Decision, long after that decision was upheld by the D.C. Circuit, and long after CN invested hundreds of millions of dollars in reliance on that decision. Because Barrington's Petition does not meet the criteria for invoking the Board's retained jurisdiction, and would, if granted, upset basic notions of administrative finality, it should be denied.[8]

ARGUMENT

I. GOVERNING LEGAL STANDARDS

"If rail carriers and shippers are unable to rely upon a Commission decision over a year after it has become final and effective (with no pending applications for judicial review or stays of effectiveness), there would be no end to the administrative process and no certainty in administrative decisionmaking." *S.R. Investors, Ltd., d/b/a Sierra R.R--Aban.-In Tuolumne County, Cal.*, Dkt. No. AB 239X, slip op. at 5 (ICC served Jan. 26, 1988) (denying reopening), *aff'd sub nom. Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989). To prevent that outcome, the law and the Board's practice impose demanding threshold requirements on

[8] Barrington frivolously claims that administrative finality does not matter here because CN once offered the Board a solution under which the Board would grant CN's request to expedite approval if CN agreed to extend the Board's full environmental review jurisdiction after the approval. Pet. at 31-32. While CN did make such an offer, the Board denied CN's request for expedited treatment, and rendered a Final Decision, including Final Mitigation Conditions. CN relied on the finality of the Board's decision in closing the Transaction. Having done so, CN is entitled to the full protection of administrative finality.

petitions seeking substantial retroactive changes to final decisions. Barrington's Petition fails to meet those requirements.

Barrington cites Final Mitigation Condition 72 ("FMC 72") and 49 C.F.R. § 1117.1, and the reopening provisions of 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, as providing the Board jurisdiction to grant the Petition. Pet. at 1. In this section, we outline the requirements set by those provisions. In the next section, we explain why Barrington has not met them. The Petition is essentially one for reopening, so we first address the reopening standards.

A. Reopening under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4

Under 49 U.S.C. 722(c), the Board may reopen a proceeding "because of material error, new evidence, or substantially changed circumstances." The well established limits of, and criteria for the exercise of, such discretion are outlined below:

- *Heavy Burden.* "Anyone who files a petition to reopen a decision has the burden of persuading the tribunal that reopening is warranted."[9] "Petitions to reopen previously final agency decisions are to be granted only in the most extraordinary circumstances."[10]
- *Materiality.* The Board will reopen only if the claimed error/new evidence/changed circumstance is material in the sense that it "would mandate a different result."[11] Thus, decisions to deny discretionary relief (such as the Board's discretionary decisions, after taking the hard look mandated by NEPA, regarding mitigation) do not constitute "material error" under the reopening standard, however they may appear "in hindsight."[12]

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[9] *Simmons v. ICC*, 760 F.2d 126, 132 (7th Cir. 1985).

[10] *Farmers Export Co. v. ICC*, 758 F.2d 733, 737 (D.C. Cir. 1985).

[11] *Montezuma Grain Co. v. STB*, 339 F.3d 535, 542 (7th Cir. 2003); *accord Desert Xpress Enters.—Pet 'n for Decl. Order*, Fin. Dkt. No. 34914 (STB served May 7, 2010).

[12] *Farmers Export*, 758 F.2d at 737-38.

- *New Evidence.* The "new evidence, or substantially changed circumstances" predicate for reopening does not mean new arguments about old evidence, or new theories or expert analyses of old facts (such as the "updated" 2011 Study and critique of the FEIS Barrington attaches to its Petition); it means new facts.[13] Thus, allegations by a party seeking reopening that the Board was earlier "misled" (Barrington's constant refrain at pages 5-6, 14-21 and 24-26 of the Petition) are "inherently self-defeating," because they necessarily imply that the pertinent evidence existed at the time of the Board's decision, and "***newly raised*** evidence is not the same as ***new*** evidence."[14]
- *Procedural Requirements for Reopening Petitions.* Petitions for reopening are provided for in 49 C.F.R. § 1115.4, and must meet the requirements of 49 C.F.R. §§ 1115.3(c) & (d). The Petition does not meet those requirements.[15]
- *The Board Approaches Reopening Cautiously, Weighing Interests of Administrative Finality and Repose* Even when there is arguably material new evidence, the Board approaches

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[13] New theories are insufficient to justify reopening because "[t]he administrative process might never end if parties could come back to the Board years after a final decision to try out a new theory." *Pyco Indus., Inc.–Feeder Line Application–Lines of S. Plains Switching, Ltd.*, Fin. Dkt. No. 34890 (STB served June 11, 2010).

[14] *Friends of Sierra R.R,* 881 F.2d at 667 (emphasis in original); *accord Town of Springfield v. STB*, 412 F.3d 187, 189 (D.C. Cir. 2005) (evidence is not "new" if it could have been placed before the Board in the original proceeding); *Canadian Nat'l Ry., Grand Trunk Corp., & Grand Trunk W. R.R. – Control – Ill. Cent. Corp., Ill. Cent. R.R., Chicago, Cent. & Pac. R.R., & Cedar River R.R.*, 6 S.T.B. 344, 350 (2002) ("'new evidence' is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.").

[15] The Petition violates § 1115.3 by: (i) relying on cumulative evidence; (ii) failing to explain why the evidence on which it relies was not previously adduced; (iii) exceeding page limits; and (iv) failing to include a separate preface and summary of argument.

petitions to reopen "cautiously, . . . striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose."[16]

B. FMC 72 and 49 C.F.R. § 1117.1

Barrington relies on FMC 72 and 49 C.F.R. § 1117.1. Pet. at 1 & n.1. But while FMC 72 further delineates the basis for Board action, it states a ***narrower*** standard than 49 U.S.C. § 722(c), and 49 C.F.R. § 1117.1 does not displace the requirements of 49 C.F.R. §§ 1115.3 and 1115.4.

In FMC 72, the Board conditioned its approval of the Transaction on its retention of jurisdiction to "review the continuing applicability of its final mitigation, if warranted," if "there is a ***material change in the facts or circumstances*** upon which the Board relied in imposing specific environmental mitigation conditions, and upon petition by any party who demonstrates such material change." Final Decision at 84 (emphasis added).[17] The Board explained that it did so to enable it to address "problems" that may "***arise after consummation*** of the transaction." *Id.* at 26 (emphasis added). The "material change in the facts or circumstances" standard in FMC 72 is no broader than the "substantially changed circumstances" standard in § 722(c), and,

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[16] *Ariz. Pub. Serv. Co. v. Atchison, Topeka & S.F. Ry.*, 3 S.T.B. 70, 75 (1998). Even when material new evidence or substantially changed circumstances are convincingly demonstrated, the Board has broad discretion to refuse to reopen. *Brooklyn E. Dist. Term. v. ICC*, 302 F. Supp. 1095, 1105 (E.D.N.Y. 1969). Administrative finality means that there is no right to reopening just because "some new circumstance has arisen, some new trend has been observed, or some new fact discovered." *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 554-55 (1978); *accord Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989); *Theodore Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 511 (D.C. Cir. 2010). Where, as here, there is no material new evidence and the petitioner's claim amounts to one of material error, the Board's refusal to reopen is not reviewable. *ICC v. Bhd. of Loco. Eng'rs*, 482 U.S. 270, 284 (1987).

[17] Thus, FMC 72, by its terms, provides a basis for modifying those conditions based on new evidence about "the effectiveness of the various conditions" the Board imposed, *id.* at 25 – not for imposing entirely new conditions.

unlike § 722(c), FMC 72 makes no provision for review based on "material error."[18] Thus, under FMC 72, the Board retains jurisdiction only to hear genuinely new evidence, not to hear "newly raised evidence" that could have been raised before, arguments that the Board was "misled" by its staff or consultants, or allegations of "material error."[19]

Nor does FMC 72 excuse Barrington from compliance with the requirements for reopening set forth in the Board's regulations.[20]

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[18] CN accepted FMC 72, and invested hundreds of millions of dollars in the Transaction, in justified reliance on the understanding that the Final Decision is final, and that the Board only retained jurisdiction to address new circumstances that "arise after" CN's consummation of the Transaction. Likewise, the D.C. Circuit upheld the Final Decision on the basis that it was final and ripe for review – not on the understanding that it was being asked to render an advisory opinion on a decision the Board might fundamentally change if it heard some new arguments about the pre-existing facts.

[19] *See Friends of Sierra R.R.*, 881 F.2d at 667.

[20] Barrington appears to assume that invocation of FMC 72 is not petitioning for reopening, and therefore that it can proceed under the catch-all provision of 49 C.F.R. § 1117.1, which provides for petitions "for relief not provided for in any other rule," rather than complying with 49 C.F.R. §§ 1115.3 and 1115.4. But the relief Barrington seeks is, in substance, reopening, which is expressly "provided for" in § 1115.4. And the Board has consistently treated relief under FMC 72, and under materially indistinguishable conditions included in other Board orders, as a species of reopening requiring compliance with reopening standards. The Board has "reopened" the present proceeding every time it has modified a condition. *See, e.g.*, Decision No. 19, slip op. at 12; Decision No. 20, slip op. at 2; Decision No. 21, slip op. at 4-6; Decision No. 22, slip op. at 2; Decision No. 24, slip op. at 3; Decision No. 25, slip op. at 2; Decision No. 28, slip op. at 2. Similarly, in the *Tongue River* case (cited in Pet. at 32), where the Board imposed Mitigation Measure 15, identical to FMC 72, providing for continued environmental oversight by the Board, *Tongue River R.R. – Construction & Operation – W. Alignment*, STB Fin. Dkt. No. 30186 (Sub-No. 3), slip op. at 40 (STB served Oct. 9, 2007) ("*Tongue River I*"), it recognized that if it were to modify its conditions it "would need to reopen the case," Fin. Dkt. No. 30186 (Sub-No. 3), slip op. at 7 n.14 (STB served June 15, 2011) ("*Tongue River II*"). Earlier, in the *Powder River Basin* case, the Board imposed a condition substantially identical to FMC 72, *see Dak., Minn. & E R R Corp. Constr. into Powder River Basin*, STB Fin. Dkt. No. 33407, slip op. at 50 (STB served Feb. 15, 2006) (Condition 145), *aff'd sub nom. Mayo Found. v. STB*, 472 F.3d 545 (8th Cir. 2006), and, as in the present proceeding, subsequently imposed a new condition requiring compliance with a new mitigation agreement by means of reopening, *see* Fin. Dkt. No. 33407, slip op. at 2 (STB served June 12, 2006).

II. BARRINGTON'S PETITION DOES NOT SATISFY THE STANDARDS FOR REOPENING

Barrington's basic arguments are entirely ones that it either made or could have made before the Board and/or the D.C. Circuit. The centerpiece of the Petition is the 2011 Study by Civiltech using a VISSIM model, which focuses on traffic delay on Route 14 and surrounding roads. (The study is, in part, an "updated" version of a similar 2008 Study by Civiltech, the similar results of which were submitted in this proceeding in 2008. *See* Barrington DEIS Cmts. at 36-40). In an attempt to demonstrate that Barrington was treated differently from other communities, the 2011 Study also models traffic delays at the rail crossing at U.S. Route 34 in Aurora, where the Board ordered CN to contribute to a grade separation. In both cases, the 2011 Study (like the 2008 Study) addresses only total roadway segment delay, a broader measure of delay than was used in the EIS, and it does not address the other factors that the Board considered in deciding whether to order grade separation funding.

A. The Results of the 2011 Study of U.S. Route 14 Add Nothing Materially New

The conclusions of Barrington's 2008 Study and 2011 Study are qualitatively the same.[21] Using a broad definition of delay, they each project: (a) greater traffic delays at Barrington's rail crossings than were projected by the Board's different analyses (in 2008 prior to the Transaction, in 2015 under a no action alternative, and in 2015 with projected post-Transaction rail traffic); and (b) greater increases than were projected by the Board in total daily traffic delays attributable to new vehicular and rail traffic. As Table 1 illustrates, the two studies yield similar projections of incremental, as well as total, traffic delay due to the projected increase to 20 trains per day as

[21] For this reason, the 2011 Study cannot constitute material "new evidence." *See Najmabadi v. Holder*, 597 F.3d 983, 987-91 (9th Cir. 2010) (holding that a report submitted in support of a petition to reopen (with a similar standard to the Board's) that "merely describes conditions similar to those found" in a report submitted in the original proceeding was not "qualitatively different" and was therefore not "new evidence").

of 2015 (Civiltech's Scenario 1). In fact, the 2011 Study shows less of an effect due to additional trains in 2015 than the 2008 Study.[22]

Table 1

Total 24-Hour Roadway Segment Delay (Hours)				
	2015 No Action (5 trains per day)	2015 Scenario 1 (20 trains per day)	Increase from No Action (Hours)	Increase from No Action (%)
2008 Study	387	522	135	35%
2011 Study	467	583	116	25%

The Board found that the results of the 2008 Study showing higher total traffic delays for roadway segments (a broader measure than SEA used in measuring whether crossings met its 40-hour total vehicle delay threshold)[23] were not a sufficient basis for ordering grade separation funding. Barrington could have again raised its arguments based on its 2008 Study by seeking reconsideration (as shown by the fact that it raised the same arguments in its petition to stay, *see* BARR-7 at 43), but it did not, and it could have raised them in court, where it instead waived them, *see Village of Barrington*, 636 F.3d at 672. The 2011 Study shows nothing materially different and provides no basis for revisiting the Board's Final Decision.[24]

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[22] Table 1 addresses the two 2015 scenarios for which the 2008 Study and the 2011 Study are most comparable: the No Action Scenario and Scenario 1. The comparisons are imperfect since Civiltech made various changing assumptions and errors regarding train speeds and lengths and other variables.

[23] The delay output of Barrington's VISSIM analysis "includes the cumulative delay from all sources on the roadway network, such as intersection delays, capacity constraints and traffic flow restrictions or interruptions, ***in addition to railroad crossing delays***." 2011 Study at 4 (emphasis added).

[24] From the limited information provided concerning Civiltech's 2011 Study, it appears that Civiltech made a number of choices that, even assuming the general premise of its approach, are factually and methodologically questionable, and cast doubt on the Study's conclusions. These include:

- Civiltech incorrectly states in its study that CN crossing gates in Barrington are operated in tandem and do not use constant warning timing ("CWT") (2011 Study at 2), both of which

B. Barrington Has Not Demonstrated Material Changed Circumstances or Adduced Material New Evidence

As explained above, the central purpose of reopening under 49 U.S.C. § 722(c) and the sole stated purpose of FMC 72 is to enable the Board to consider material factual changes that "arise after" the Final Decision. Reconsideration of old facts offends all the values protected by administrative finality; it should only be indulged in the most extraordinary of circumstances.

Barrington therefore is forced to claim "Newly Discovered Evidence." Pet. at 9. But what it places under that heading is an extended discussion of the conclusions of its 2011 Study, covering the same general subject matter and performed by the same consultants as the 2008 Study it summarized in its DEIS Comments, and which the D.C. Circuit discussed in its opinion affirming the Board's Final Decision (*Village of Barrington*, 636 F.3d at 672). The focus of the 2008 Study and the 2011 Study is a methodological disagreement between Barrington's consultants and SEA (and the Board's consultants) regarding modeling and assumptions – not any new evidence.[25] And the absence of any new material facts is underlined by the similarities

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would increase gate down time and vehicular delays. In fact, none of CN's crossing gates in Barrington operate in tandem, and all of them use CWT. *See* V.S. Ryon at 2.

- Civiltech manipulated pre- and post-Transaction train speeds in its model with the effect of increasing Transaction-related vehicular delay. Its pre-Transaction and No Action scenarios use an EIS estimated train speed of 38 mph instead of the observed actual pre-Transaction speed of 16-24 mph (2011 Study at 11), but its 2015 post-Transaction scenarios ignore the 39 mph EIS estimate and use an average speed of 32 mph based on its 2011 observations (*id.* at 12-13).
- In a departure from its 2008 study, Civiltech inflated assumed levels of peak hour vehicular traffic by ignoring summer traffic patterns and focusing exclusively on fall patterns when peak time traffic and congestion is greatest. 2011 Study at 8.
- Civiltech artificially increased delay for the post-Transaction scenarios as compared to the No Action scenario by optimizing traffic signal timing for its pre-Transaction and No Action scenarios but not doing so for its post-Transaction scenarios. *Id.* at 8, 11.
- Based on Civiltech's Exhibit A-2, Civiltech appears to have omitted from its road network definition the stoplight at Lake Cook Road and Route 14. *Cf.* FEIS, App. A at 56-57.

[25] For criticism of SEA's primary delay analysis and assertion that a VISSIM analysis is better and tends to show more delay in Barrington, *compare* Pet. at 10 & 16 *with* Barrington's DEIS

between the conclusions of Barrington's two studies.[26] The 2011 Study demonstrates only that Barrington continues to believe that the analysis in the EIS could have been done differently.

Moreover, the only "new evidence" in the 2011 Study and the accompanying verified statement is de minimis and immaterial. It consists of a summary of observations made during a 35-day period in May/June 2011 of the frequency, scheduling, and length of trains crossing U.S. Route 14. 2011 Study, Table A-1. These data show nothing remarkable, but merely that CN is currently running only 6 trains per day (one more than the pre-Transaction status quo) instead of the 20 trains projected by the Board, that those trains are shorter on average than those projected by the Board, and that they are running much faster than the pre-Transaction EJ&E trains, albeit somewhat slower than the Board projected at full Transaction implementation.[27] 2011 Study at 12.

Cmts. at 34-40; for criticism of HDR's use of a peak period in its supplemental traffic study of the Village of Barrington ("VOBTOA Study"), *compare* Pet. at 14-15 *with* BARR-7 at 44 (Barrington's stay petition); for criticism of HDR's other assumptions in the VOBTOA Study. *compare* Pet. at 15-16 *with* BARR-7 at 44-45; for assertions that STB's final mitigation allegedly fails to treat like crossings alike, *compare* Pet. at 12 *with* Barrington's Opening Brief on Appeal at 42.

[26] Barrington does not suggest, for example, that it would have been less entitled to a grade separation based on the results of the 2008 Study than it would be would be based on the results of the 2011 Study. Instead, it argues that the 2011 Study "confirms" that the Board erred in not imposing a grade separation condition based on the 2008 Study. Pet. at 14.

[27] Barrington's remaining evidence is even more obviously neither new nor material:

- Barrington states that the Route 14 crossing has been blocked by CN trains for more than an hour on two occasions in the nearly 3 years since CN began operations on the line. Pet. at 7-8. But the Board was aware of the possibility of such occurrences, which was specifically raised by Barrington. DEIS Cmts. at 2.
- Barrington references a recent U.S. Department of Transportation grant to fund a study of a possible grade separation at Route 14. Pet. at 27-28. But its grant of study funding under entirely different criteria than those used by the Board in deciding whether to require CN to fund construction of grade separations is not material or even relevant.
- Barrington references a press release about increasing train speeds and train lengths in Canada in 2011, and a newspaper article about an individual test train run by a different

Because Barrington's mid-2011 snapshot does not bear directly on any of the key scenarios covered by the various traffic studies (the pre-Transaction scenario (2008), the no action scenario (2015), or the post-Transaction scenario after full implementation (2015)), Barrington projects the "new" 2011 data to 2015. In doing so, it makes a number of implausible and unjustified "extrapolations" from the timing, size, and speed of 6 trains per day in 2011 to the timing, size, and speed of 20 projected trains per day in 2015.[28] Nonetheless, the end result of these highly questionable extrapolations and estimations is a 2011 Study that purports to project similar total delay to the 2008 Study, and even less incremental delay.

Since the 2011 Study is not new evidence, and shows nothing materially different from the 2008 Study, Barrington is left to argue that the Board may have been "misled" by the way in which its own SEA and its own consultants expressed the results of the analyses reflected in the FEIS. For example, Barrington claims that the study "confirm[s]" the FEIS's "methodological

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railroad in California in 2010. Pet. at 29-30. But it makes no showing that those items undermine the FEIS's projections as to train speeds and train lengths in Illinois in 2015.

- Barrington argues that train lengths assumed in the FEIS should be rejected because it observed that 3% of CN's trains exceeded 10,000 feet in length. Pet. at 29. But Barrington's data show that CN's average train length in 2011 was well below the average projected in the FEIS for 2015. *See* 2011 Study at 12.
- Barrington recites various facts that were part of the administrative record for the Final Decision: other U.S. routes across the EJ&E line have grade separations; the nearest grade separations are about 5 miles away; delays may affect a nearby hospital and emergency responders; and there are pre-existing traffic delays in Barrington caused by UP's commuter operations. Pet. at 5-8. Barrington does not and cannot claim that there is anything new about any of these points. *See, e.g.*, FEIS 3.4-175-76, 185, 239-40, 387-88.
- The remainder of Barrington's Petition adds no new evidence. Pages 14-23 re-assert methodological arguments and criticisms of SEA's 2008 analyses, and pages 23-26 & 31-33 make legal arguments.

[28] Barrington assumes (i) that the 6-train 2011 snapshot defines the times at which 20 trains per day will run in 2015; (ii) that there will be no increase in average train speed after CN finishes its planned improvements on the line; and (iii) in its Scenario 2, that trains will be substantially longer than predicted in the FEIS or observed in 2011 (while failing to consider that if CN ran longer trains than predicted, it would need fewer of them to carry the same freight). 2011 Study at 12-13 & Tables A-2 & A-3.

errors" and that the Board's consultants' analysis was "highly misleading" (Pet. at 14) and "misled the Board" (*id.* at 17) and caused the Board to "miscomprehend" the evidence in the record (*id.* at 25). But the 2011 Study does none of those things. Further, because these assertions relate to pre-existing facts, insofar as Barrington relies on them to support its claim of material changed circumstances or new evidence, these assertions, encompassing pages 14-23 of the Petition and most of the supporting verified statement and 2011 Study, are "self-defeating." *Friends of Sierra R.R.*, 881 F.2d at 667.

Barrington's use of the 2011 Study to revisit old arguments about the significance of evidence that was before the Board before its Final Decision appears on a new piece of paper, but it does not constitute new evidence. Given the exceptionally strong interests of administrative finality in this case, the many chances Barrington had to make its arguments before and after the Final Decision, and the unfairness to CN if there were to be a fundamental change in the Board's Final Order long after CN has irrevocably acted in reliance on the finality of the Board's order, the Board should go no further.[29] However, even if the Board were to consider Barrington's arguments regarding material error, they fail on their face.

[29] Barrington suggests that *Tongue River II* and similar decisions, which cite the need for administrative finality limiting the rights of parties to demand reopening, should be distinguished from this proceeding in light of FMC 72. Pet. at 32. But Barrington ignores the fact that, in the very *Tongue River* proceeding it cites, the Board had imposed an oversight condition in words ***identical*** to FMC 72. *See Tongue River I*, slip op. at 40 (Mitigation Measure 15 (Material Changes)) ("If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions, and upon petition by any party who demonstrates such material change, the Board may review the continuing applicability of its final mitigation, if warranted."). Barrington's alleged distinction is therefore illusory.

C. Barrington Has Not Demonstrated Material Error

Finally, for several reasons, Barrington has not shown that the Board erred. Certainly, it has not met its heavy burden to show errors so material that they outweigh the important interests in administrative finality, repose, and fairness to CN.

First, even taking the conclusions Barrington asserts at face value, the errors it asserts are not material as a matter of law. The Board's decision not to grant the grade separation condition Barrington seeks cannot be a legally material error, because the Board was under no duty to order ***any*** mitigation, *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989). NEPA requires only a "hard look" at environmental concerns before the major federal action proceeds, *see id.* at 350, 352, 356, and, as the D.C. Circuit ruled, the Board clearly met that standard. On its face, Barrington's Petition claims only that it would have been preferable, not that it was required, for the Board to grant the grade separation condition. That does not constitute an assertion of "material error" as required by 49 U.S.C. § 722(c). *Montezuma Grain*, 339 F.3d at 542.

Second, Barrington's claims would not amount to "material error" even if that term were understood in a weaker, non-legal sense to mean that had the Board understood the facts to be as Barrington alleges, it would have acted differently. Barrington's 2011 Study (like its 2008 Study) only purports to address total vehicle delay (albeit through a broader measure), which was one of three bases the Board identified for considering a crossing "substantially affected," and thus a potential candidate for some mitigation, *see* Final Decision at 43. SEA (and the Board, which adopted its reasoning, *see id.* at 45) was explicit that it would not order a grade separation for vehicular delay alone. FEIS at 4-12. Of the 16 crossings that SEA found to be "substantially affected," *see id.* at 4-8, and the 5 crossings that met SEA's 40-hour threshold for vehicular

delay, *see id.* at 4-11. the Board ordered grade separation funding at only two: U.S. Route 34 (Ogden Avenue) in Aurora and U.S. Route 30 (Lincoln Highway) in Lynwood. The Board selected those two crossings based on an individualized analysis that considered multiple factors, including, significantly, the fact that those were two of the three crossings that "would potentially experience a substantial increase in exposure of highway vehicles to trains to one million or greater per day." Final Decision at 43 & n.93; *see also id.* at 47 (emphasizing exposure in the context of the grade separation decision). Barrington does not purport to show that the Board erred in its evaluation of the various factors other than total vehicle delay that it considered in determining mitigation at grade crossings, and Barrington concedes that the Route 14 crossing does not meet the Board's exposure threshold. Pet. at 13; 2011 Study at 17.

Third, Barrington's principal criticisms of the Board's environmental review are meritless, and Barrington's repeated assertions that the Board was "misled" by its own SEA and its own consultants are frivolous. For example, there is no merit to (a) Barrington's critique of SEA's use, in the supplemental VOBTOA Study, of a peak-period analysis, instead of a 24-hour analysis;[30] (b) Barrington's critique of the VOBTOA Study on the grounds that Civiltech

[30] Pet. at 14-15, 20-21. Barrington's critique asserts that CN imposes a "freight train curfew" during peak periods, and that rail traffic modeled in the VOBTOA Study was therefore unrepresentatively low (*id.* at 14); that the Board was unaware that the peak-period analysis "could not be legitimately compared" to a 24-hour analysis (*id.* at 20); and that the VOBTOA Study's conclusion is wrong (*id.* at 14-15). Yet Barrington's own train observations confirm that there is no absolute curfew. Moreover, the purpose of the peak-hours study was not to duplicate a 24-hour study, but to supplement the Board's earlier traffic analysis and respond to Barrington's specific criticisms. The choice of a peak hour for study was logical because that is when the highest vehicular traffic volume occurs (which Barrington does not deny), and Barrington had criticized the DEIS for ***not*** analyzing peak hour conditions (Barrington DEIS Cmts. at 35). In any event, potentially reduced peak hour traffic could not undermine the VOBTOA Study because the Board's consultants specifically assumed that trains would run during peak hours (otherwise they would have had nothing to model). As to the conclusions of the study, Barrington says nothing about SEA's equally important conclusion that "there was no

disagrees with the road network across which traffic delay projections were modeled;[31] (c) Barrington's critique, supposedly inferred from the use of a single ambiguous word, "validate," in the FEIS, that the Board's consultants "misled the Board" by pursuing a "disingenuous . . . stratagem" with respect to their supplemental analysis that they hid from the Board;[32] (d) Barrington's claim that SEA's "vehicular delays chart (Table A.5-1 of the FEIS) incorrectly calculated 24-hour Total Vehicle Traffic Delay percent increases for all EJ&E crossings, which made the increases in delay appear to be much smaller than they actually were;"[33] or (e) Barrington's claim that the Board's consultants failed to "direct the Board's attention" to Barrington's record criticism of their work (*id.* at 18-20), when Barrington itself put that criticism before the Board. These critiques show at most that Barrington disagrees with the Board's approach in its Final Decision, but not that the Board committed material error.

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increase in the number of intersections operating at an unacceptable LOS under the Proposed Action scenario." VOBTOA Study at 46; FEIS App. A.5 at 100.

[31] Pet. at 15-16. This is a matter of professional judgment, and Barrington's criticisms, which are vague, conclusory, and unsupported by objective evidence, do not show that Civiltech's judgment is superior. Moreover, the road network definition used by Civiltech in its model appears flawed, since Civiltech evidently failed to take into account the stoplight at Lake Cook Road and Route 14 and the accompanying relevant road network. *Compare* 2011 Study, Ex. A-2, *with* FEIS, App. A at 56-57. In any event, Barrington has made no showing that HDR's network definition had any material impact on HDR's results. Indeed, even from the sketchy information provided by Civiltech, which does not allow for a direct comparison, it appears that Civiltech used an even larger network. *Cf.* 2011 Study, Ex. A-2 to VOBTOA at 2-4, FEIS App. A.5 at 57.

[32] Pet. at 17-18. The sole basis for Barrington's inference that this "stratagem" was pursued is a word in the FEIS, which was, of course, carefully reviewed by the Board, not hidden from it.

[33] Pet. at 18. Barrington misreads the chart, which is clear and accurate. The "Percent Increase" column expresses the delay attributable to the Transaction as a percentage of the total delay under the Proposed Action scenario (*e.g.*, if total delay were 100 under the No Action scenario and 200 under the Proposed Action scenario, it would be 50%). It does not measure, and does not purport to measure, the total percent increase from the No Action alternative to the Proposed Action (which would be 100% in the above hypothetical), as Barrington misleadingly suggests. Certainly, the Board understood those percentages, as it relied on them to determine the shares to be borne by CN of the cost of mitigation in Aurora and Lynwood. Final Decision at 46.

CONCLUSION

Barrington challenged the EIS process at the Board and at the D.C. Circuit and lost. It now asks the Board to change its mind, and to add retroactively tens of millions of dollars to the price CN has paid for a Transaction approved by the Board, and consummated by CN, almost three years ago. Barrington has no material new evidence to support its request, and its assertions of error have already been determined by the Board and the D.C. Circuit to be ill-founded. Granting that request would undermine administrative finality, treat the D.C. Circuit's ruling upholding the Board's Final Decision like an advisory opinion, and violate fundamental principles of fairness. The Petition should be denied.

Respectfully submitted,

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Counsel for Canadian National Railway Company and Grand Trunk Corporation

November 3, 2011

CERTIFICATE OF SERVICE

I certify that I have this 3d day of November, 2011, caused a true copy of the foregoing CN's Reply in Opposition to the Village of Barrington's Petition Seeking Imposition of Additional Mitigation (CN-65), including the accompanying Verified Statement of Mark Ryon, to be served by hand delivery upon:

Richard H. Streeter
Law Firm of Richard H. Streeter
5255 Partridge Lane, N.W.
Washington, DC 20016

_____
Caroline M. Gignoux

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35087 (Sub-No. 8)

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
– CONTROL –
EJ&E WEST COMPANY

[Barrington Petition for Mitigation]

VERIFIED STATEMENT OF MARK RYON

1. My name is Mark Ryon. I am the Senior Manager Signals and Communications for Canadian National Railway Company and its subsidiaries (collectively, "CN"). In that position, I am responsible for signals and communications in CN's Southern Region, which includes the lines of CN's railroad subsidiaries in the United States, including the Elgin, Joliet and Eastern Railway Company ("EJ&E").

2. I have been asked by CN to respond to certain claims made by Civiltech Engineering, Inc., in its CN Railway Traffic Impact Study Update: Final Report ("2011 Study"), which was prepared for the Village of Barrington ("Barrington") and submitted to the Surface Transportation Board ("Board") together with and in support of Barrington's Petition Seeking Imposition of Additional Mitigation ("Petition"), which was filed with the Board on October 14, 2011.

3. Civiltech's 2011 Study contains the following statement:

> The Village of Barrington has several unique conditions that affect traffic flow over the CN crossings that must be accounted for in any sophisticated methodology for calculating delays. The proximity of rail crossings along the CN line in Barrington

> necessitates the activation of warning signals at nearby crossings in tandem, rather than providing constant advance warning times at each crossing. This increases railroad delays at some crossings in relation to delays that would be expected if the crossing was isolated.[1]

4. The premise of that statement is incorrect. In fact, none of the CN active crossing warning devices in Barrington work in tandem. Each of the four highway-rail at-grade crossings in Barrington – Lake Cook Road/Main Street, State Route 59 (Hough Street), U.S. Route 14 (Northwest Highway), and Lake Zurich Road – is governed by constant warning time ("CWT") circuitry. The devices therefore do not provide excessive warning times, during which gates are down and vehicles blocked from crossing the tracks. CN upgraded the last of these devices (at Route 59 (Hough Street)) to CWT in February 2010, after acquiring the EJ&E line.

5. CWT circuitry is used to monitor the speeds of approaching trains so as to start the crossing protection (such as gates and flashing lights) with safe and consistent warning times, regardless of the train speed. This technology substantially reduces the amount of time the warning devices at the crossing are active when approached by a slow moving train. Older versions of crossing protection circuitry would start the crossing protection once the train had passed a crossing approach track circuit upstream of the crossing and did not take into account the speed of the train. Trains traveling at track speed would be given the appropriate warning time, but trains traveling slower than track speed would be given extended warning times, during which vehicles at highways protected by gates would be blocked from crossing the track for a longer period before the arrival of the train than necessary for safety.

6. Civiltech was incorrect, not only in its belief that CN's crossing warning gates in Barrington operate in tandem without CWT, but also in its further conclusions, based on that

[1] 2011 Study at 2.

erroneous understanding, that these inefficiencies (which do not exist in Barrington) make Barrington unique and increase railroad delays there.

VERIFICATION

I, Mark Ryon, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on November 1st, 2011.

Mark Ryon